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Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

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JASON ROSS,

Plaintiff/Appellant

vs.

EPIC ENGINEERING, PC,

Defendant/Appellee

Case No. 20110537

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REPLY BRIEF OF APPELLANTS

---

Appeal from the Eighth Judicial District Court, Duchesne County, State of Utah  
The Honorable Edwin T. Peterson

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## ARGUMENT

Appellee wants to make this case, and Appellant's appeal, about what the experts have and have not established regarding a structural engineer's duty of reasonable care. Both the trial court's and Appellee's emphasis on experts and reasonable care is misplaced. Appellant has appealed the trial court's ruling that granted a once-denied Motion for Summary Judgment on Appellant's claim for breach of contract. The admission or denial of expert testimony regarding standard of care, while also important, is only a minor part of this appeal.

The main issue of this Appeal is the trial court's decision to completely reverse itself, without basis, and to ignore specific, controverted facts regarding the content, scope, and meaning of the contract at issue. Such a decision was incorrect, as a trial court cannot reject genuine issues of material fact and weigh evidence. Appellant's breach of contract claim does not rely upon any aspect of his expert's testimony, and the trial court's dismissal of his claim on the basis of inadmissible expert testimony was legally incorrect.

Appellant does not dispute that he has also appealed the trial court's decision to bar Plaintiff's expert from testifying at trial. However, the appeal focuses not on the substance of the decision that the trial court made to bar the expert evidence (because there is no substantive record of qualifications), but on the procedure that the trial court followed to reach that decision. Appellant did not have the chance to present the foundational evidence that would have allowed the trial court to make a substantive decision on the admissibility of Appellant's expert testimony. The trial court abused its

discretion when it arbitrarily modified the Utah Rules of Civil Procedure and prevented Appellant from providing the trial court with the expert's qualifications. In essence, the trial court never actually decided whether or not the Appellant's expert was qualified to testify at trial, because the trial court short-circuited the process established by the Utah Supreme Court for making such a decision. By disqualifying Appellant's expert prior to allowing Appellant to even attempt to lay foundation supporting the admissibility of the expert's testimony, the trial court abused its discretion. This Court must analyze the trial court's use of its discretion in that procedural decision, for that prefatory decision is the decision that allowed the trial court to make all of its subsequent rulings regarding Appellant's expert.

**I. THE TRIAL COURT'S DECISION TO GRANT SUMMARY JUDGMENT SHOULD BE REVERSED.**

Appellee's contention that Appellant could not prevail on his breach of contract claim without establishing the relevant standard of care is wrong. As demonstrated in Appellant's opening brief, a claim for breach of contract does not require the imposition of any outside, legally-recognized duty or standard of care. When considering a claim for breach of contract, the parties' obligations to one another flow from the contractual agreement that the parties themselves made. (*See* Appellants' Brief at p. 17.) Appellant has not alleged that Appellee breached a duty of skill or care, but rather that the plans that Appellee created were deficient, unsuitable, and not compliant with Appellee's contractual obligation to provide structural engineering plans for construction of Appellant's building upon Appellant's property. (*See* R. at 3.)

Appellee ignores Appellant's argument and simply insists that, without a competing standard of care from Appellant, there is no dispute that can be raised as to the scope of the parties' bargain and obligations to one another. Appellee's argument misses the point. Appellant does not dispute that expert testimony is required to establish a standard of care; Appellant disputes that he is required, in support of his claim for breach of contract, to establish a standard of care. No such obligation exists in Utah, and the trial court erred when it created one.<sup>1</sup>

*A. Opinions that speak to the necessity of establishing a standard of care in negligence or breach of fiduciary duty cases do not govern inquiries as to disputed obligations of a contract.*

In support of its argument that Appellant was obligated to establish a standard of care to pursue his breach of contract claim, Appellee relies upon three Utah cases that do not address, in any way, claims for breach of contract. For example, in *Wycalis v. Guardian Title of Utah*, the Court of Appeals analyzed a litigant's claim for breach of fiduciary duty. 780 P.2d 821 (Utah Ct. App. 1989). In *Chadwick v. Nielsen*, the Court of Appeals analyzed a litigant's claim for medical malpractice against a doctor. 763 P.2d 817 (Utah Ct. App. 1988). In *Nauman v. Harold K. Beecher & Assocs.*, the Utah Supreme Court also analyzed a litigant's claim for negligence against an architect. 467 P.2d 610 (Utah 1970). To the extent that these three cases speak to the requirement that an expert,

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<sup>1</sup> Appellee's contention that analysis of the trial court's rejection of the expert testimony should come before analysis of the trial court's ruling on summary judgment is not applicable to this case. As stated above (and very clearly throughout Appellant's opening Brief), the summary judgment decision and the expert testimony decision are different. The trial court was wrong in both decisions, but that does not somehow make the trial court's decision regarding summary judgment dependent upon the trial court's decision regarding expert testimony.



not a lay witness, provide evidence to establish a standard of care, Appellant does not dispute their applicability. However, to the extent that Appellee or the trial court relied on these cases to support a position that Appellant was obligated to establish a standard of care in this case simply to support any claim for breach of contract, not one of these cases stands for that proposition.

*B. The National Housing case is not instructive, as its facts regarding the breach of contract claim are far different than the facts in this case.*

Appellee's reliance upon *National Housing Industries, Inc. v. E.L. Jones Development, Co.*, 576 P.2d 1374 (Ariz. Ct. App. 1978), is misplaced, as is Appellee's contention that this Court favorably adopted the holding within *National Housing* in *Wycalis v. Guardian Title of Utah*. Utah has not adopted *National Housing* as authoritative when considering a breach of contract claim. Furthermore, *National Housing* did not stand for the proposition that standard of care analysis is required in a breach of contract claim.

1. *Wycalis*'s reference to *National Housing* is not relevant to this case.

That this Court, in *Wycalis*, positively cited the *National Housing* case is not compelling. The *Wycalis* court simply referentially addressed *National Housing* in support of a contention that expert testimony is "helpful in elucidating the standard of care." 780 P.2d at 826, n. 8. Again, as stated above, Appellant does not dispute this point. The *Wycalis* court did not even consider a breach of contract claim anywhere within the opinion and nowhere did it state that a plaintiff must establish a standard of care in order to sue an engineer for breach of contract. Despite Appellee's claim, the *Wycalis* court did

not cite *National Housing* favorably for any legal issue or other reason that is relevant to the issue on appeal.

2. *National Housing* is inapplicable to this case.

Appellee's explanation and analysis of *National Housing* is incomplete. Once the entire case is actually analyzed, it is clear that *National Housing* is both factually distinguishable and legally irrelevant to this Court's analysis of this case. As to the facts, it is imperative to understand that, in *National Housing*, the plaintiff (National Housing) was not the party that actually entered into the contract at issue (E.L. Jones Development, the assignor, was), but rather was an assignee of that contract. 576 P.2d at 1376. National Housing, as assignee, claimed that the contract always contemplated that the engineer would include a cut and fill estimate within its original plans, and that by not doing so, the engineer breached the contract. *Id.* However, National Housing's argument was specifically controverted by E.L. Jones Development, the party that actually executed the contract with the engineer. The president of E.L. Jones Development, who actually executed the contract, testified at a deposition "that the contract he entered into on behalf of" E.L. Jones Development with the engineer "did not contemplate that the defendant would prepare cut and fill estimates and that such estimates would not be provided unless specifically requested." *Id.* at 1378.

As shown above, in *National Housing*, both parties to the contract testified, unequivocally, that no cut and fill estimates were contemplated by the contract. There was no ambiguity as to the specific terms of the contract, and National Housing, as a plaintiff, attempted to attack the contract by imposing a superseding duty upon the

engineer. It was in that context that the court in *National Housing* analyzed the necessity of, and required showings for, a standard of care.

Such an exercise is not applicable to this case. Appellant has specifically controverted Appellee's version of the contract at issue through sworn testimony. In response to Appellant's position that he never agreed to any version of a page 2, Appellee presented two different versions of the page 2 to which Appellant purportedly agreed. Therefore, in this case, unlike in *National Housing*, the parties that executed the contract do dispute the contents of the contract, and a genuine issue of fact exists as to the terms of the parties' agreement within that contract.

Therefore, the factual starting point for the analysis of Appellant's contract claim is far different than the starting point in *National Housing*, and for that reason, *National Housing's* reliance upon a standard of care analysis is inapposite to the straightforward breach of contract analysis that faces this Court in this case. Again, as explained in Appellant's opening Brief, the trial court initially ruled that this dispute regarding the terms of the contract created an ambiguity that foreclosed Appellee's entitlement to summary judgment. That ruling by the trial court was the correct ruling, as it reserved, for the factfinder, the opportunity to determine what contract the parties actually created. For whatever reason, the trial court later eschewed that viable position and instead created a heretofore non-existent, overarching requirement that Appellant demonstrate that Appellee violated a standard of care.

C. *Only if a factfinder decides that the disputed page 2 was actually a part of the contract would the issue of Appellee's standard of care be relevant.*

The contractual issue of an engineer's standard of care will only be relevant if the factfinder decides that Appellant did, in fact, agree to the terms within some version of the page 2 of Appellee's standard form contract. This is because it is on that page 2 that Appellee states that its contractual performance is not subject to any warranty and that its performance "will be in accordance with a degree of care and skill generally exercised by professionals performing similar work under similar circumstances." (R. at 148.)

However, as explained above, there is a genuine issue of material fact as to whether or not page 2 is part of the contract. If it is not part of the contract, then the standard of care analysis is irrelevant. The trial court was not entitled to overlook the ambiguities of the contract and unilaterally decide that page 2 was, in fact, part of the contract.

## **II. THE TRIAL COURT'S DECISION TO NOT ALLOW APPELLANT TO PROFFER THE FOUNDATION FOR THE ADMISSIBILITY OF HIS EXPERT WAS AN ABUSE OF DISCRETION.**

The trial court's decision to bar Appellant's expert from testifying without allowing Appellant the chance to lay any foundation for the admissibility of that expert's testimony was unjustified and unsupportable. Despite clear procedural rules that gave Appellant the right to respond to the Motion in Limine and case law that laid out the exact process that the trial court should follow when deciding whether an expert was qualified, the trial court neither followed the procedural rules nor the process for deciding whether Appellant's expert was qualified to testify. The trial court cut Appellant off from

the opportunity to present foundational evidence that, under Utah law, he was required, and entitled, to present.

*A. The trial court's decision to shorten the briefing timeframe without giving prior notice was an abuse of discretion and it substantially affected the outcome of the proceedings.*

The trial court's decision to shorten the briefing time led the trial court to declare that it believed that Appellee's Motion in Limine was unopposed. (R. at 713.) The trial court then soon after not only granted the Motion in Limine as unopposed, but reopened, sua sponte, a previously denied Motion for Summary Judgment and reversed its decision. To claim that the trial court's decision to shorten the briefing time and consider Appellee's Motion unopposed was inconsequential is not at all accurate. The trial court's decision regarding the "unopposed" Motion in Limine precipitated every other incorrect ruling that the trial court made. For the reasons elucidated in the initial Brief, the trial court did, in fact, abuse its discretion when it shortened Appellant's time to respond to the Motion in Limine. That decision was not inconsequential, and it certainly affected the outcome of Appellant's case. It should be reversed.

*B. The trial court's decision to bar admission of Appellant's expert's testimony without allowing Appellant to proffer his qualifications was an abuse of discretion.*

Mr. Nordquist, the Appellant's expert, did elucidate a standard of care within his report and during his deposition. (R. at 53-69, 271, 323; see Appellant's Brief at pp. 19-20.) The trial court disregarded this opinion, and refused to allow Appellant to even officially proffer foundation in support of Mr. Nordquist's qualifications to give testimony as to Appellee's standard of care.

Mr. Nordquist opined about a standard of care that applies to all engineers, regardless of their specialty. (R. at 271.) By ruling at the time and in the manner that it did, the trial court did not allow Appellant any opportunity even to attempt to lay the necessary foundation to satisfy the requirements that the Utah Supreme Court elucidated in *Boice v. Marble*. 1999 UT 71, ¶ 14, 982 P.2d 565 (stating that an expert can testify outside of his or her specialty if the foundation laid by the party presenting the expert establishes that the standards of care observed by the two specialties are the same and that the expert has the independent knowledge regarding the other specialty's standard of care). (See also Appellee's Brief at 21.) There is no way for this Court to evaluate the trial court's substantive decision regarding the admissibility of Mr. Nordquist's opinion because the trial court prematurely terminated the process of establishing Mr. Nordquist's credentials. This Court cannot decide whether or not Mr. Nordquist was qualified to testify, because Appellant had no chance even to create a record of Mr. Nordquist's specific qualifications.

Appellee's claim that Mr. Nordquist was not qualified to provide expert testimony regarding Appellee's standard of care is just as unsupportable, because Appellee can only rely upon Mr. Nordquist's status as a geotechnical, rather than a structural, engineer. (See Appellee's Brief at p. 21.) As demonstrated in *Boice*, simply asserting that an expert does not share the same specialty as the subject of the expert testimony is not sufficient to justify disqualification of the expert. 1999 UT 71, ¶ 14. Therefore, Appellee's contention that "Ross failed to make the threshold showing of competency required by Utah Rule of

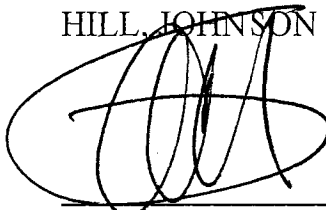
Evidence 702” (Appellee’s Brief at p. 23) has no basis, because Appellant was never given the chance to make such a threshold showing.

### CONCLUSION

Genuine issues of material fact exist that precluded the trial court from entering summary judgment against Appellant. Furthermore, the trial court abused its discretion when it barred Plaintiff from introducing Mr. Nordquist’s expert testimony at trial. The Court should reverse the trial court’s rulings.

Respectfully submitted this 3<sup>rd</sup> day of January 2012.

HILL, JOHNSON & SCHMUTZ, L.C.



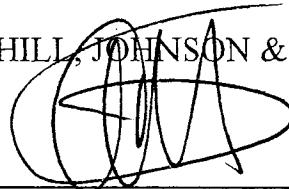
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### ***Rule 24(f)(1) Compliance Certification***

The Reply Brief of Appellants complies with the requirements of Rule 24(f)(1). The non-exempt portion of the Brief (including footnotes) contains 2,646 words.

HILL, JOHNSON & SCHMUTZ, L.C.



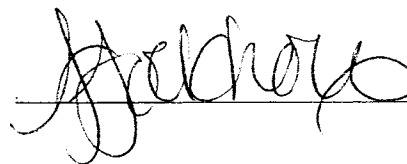
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**PROOF OF SERVICE**

I hereby certify that, on the 3<sup>rd</sup> day of January 2012, two true and correct copies of the foregoing **REPLY BRIEF OF APPELLANTS** were mailed, by U.S. Mail to the following:

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A handwritten signature in cursive script, appearing to read "Ryon", is written over a horizontal line.